WSNCHS North, Inc., d/b/a New Island Hospital *and* New York State Nurses Association. Case 29–CA–26162

January 21, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On August 20, 2004, Administrative Law Judge D. Barry Morris issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions,[2] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, WSNCHS North, Inc., d/b/a New Island Hospital, Hempstead, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We agree that deferral to arbitration is not appropriate in this case. The arbitrator did not resolve the parties' information-request dispute in a reasonably timely manner. The Union filed grievances over the staffing-guideline dispute in January 2003 and demanded arbitration in September 2003. On February 11, 2004, the Union served a subpoena duces tecum on the Respondent seeking the information at issue in this case. The Respondent moved the arbitrator to quash the subpoena. The arbitrator first considered the Respondent's motion to quash on March 9, 2004. As of the date of the instant Board decision, more than 10 months have elapsed, and the Union still has not received a ruling on whether it is entitled to the requested information. Because the arbitrator has not promptly resolved the parties' information-request dispute, we find that deferral is inappropriate. We find it unnecessary to pass on whether, absent such a delay, the Board properly should defer an information-request allegation to arbitration where a charging party has invoked the grievance-arbitration process and has also filed a charge with the Board.

Member Liebman agrees that the Board should not defer the information-request allegation to arbitration, but would rely on the Board's longstanding policy of not deferring such matters. See *Postal Service*, 302 NLRB 918 (1991).

Dated, Washington, D.C. January 21, 2005

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Marcia Adams, Esq., for the General Counsel.
Michael McGrath, Esq., for the Respondent.
Elizabeth Orfan, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

D. BARRY MORRIS, Administrative Law Judge. This case was heard before me in Brooklyn, New York, on June 23, 2004.[1] Upon a charge filed on March 11, a complaint was issued on May 13, alleging that WSNCHS[2] North, Inc., d/b/a New Island Hospital (Respondent or the Hospital) violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) by not complying with a request for information. Respondent filed an answer denying the commission of the alleged unfair labor practice.

The parties were given full opportunity to participate, produce evidence, examine and cross-examine, argue orally, and file briefs. Briefs were filed by the parties on July 30, 2004. Upon the entire record of the case, including my observation of the demeanor of the witness,[3] I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a New York corporation, with its principal office in Hempstead, New York, has been engaged in the operation of an acute care hospital. It has been admitted, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. In addition, it has been admitted, and I find, that New York State Nurses Association (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

[1] All dates refer to 2004 unless otherwise specified.

[2] The caption in the complaint originally stated "WSNBH." I granted Respondent's motion to amend the caption to read "WSNCHS."

[3] Only one witness testified in this proceeding. Credibilty resolutions have been made based upon her demeanor, the weight of respective evidence, established or admitted facts, inherent probabilities, and inferences drawn from the record as a whole.

II. THE ALLEGED UNFAIR LABOR PRACTICE

A. The Facts

1. Background

The parties executed a collective-bargaining agreement in effect from April 1, 2002 until March 31, 2005. Article 3.07 contains a provision for staffing guidelines which was to have gone into effect on December 14, 2002. The Hospital did not implement the guidelines at that time.

2. Grievances

On January 2, 2003, the Union filed four grievances for "failure to meet the staffing guidelines" in the telemetry, ICU, CCU, and "B" units. It did not file a grievance covering the surgery unit. In July 2003 the four grievances were combined into a single grievance. The remedy requested was "immediate adherence to the guidelines. Make RNs whole." On September 9, 2003 the Union filed a demand for arbitration in connection with the consolidated grievance.

3. Request for information

By letter dated February 6, 2004 the Union requested information from the Hospital concerning the four units specified in the grievances plus the surgery unit. The request was for the period from December 14, 2002 through January 15, 2004, and requested daily census, assignment and scheduling sheets, float book pages and daily time graphs. The Hospital did not comply with the request. The arbitration hearing was scheduled to commence on March 9. In connection therewith on February 11 the Union submitted a subpoena duces tecum to Respondent. The subpoena requested the same information asked for in the Request for Information, except that it did not request information for the surgery unit. Counsel for the Hospital moved to quash the subpoena. The arbitrator did not rule on the motion to quash and the arbitration is scheduled to resume on October 28.

4. Testimony of Dedowitz

Denise Dedowitz, the Union's nursing representative, was the only witness to testify in this proceeding. She appeared to me to be a credible witness and I credit her testimony. She testified that the daily census sheets reveal the number of patients on a particular day in a specific unit. The assignment books reveal the number of nurses, ward clerks, and nursing assistants assigned to a unit on a particular day. The scheduling sheets show how many nurses were scheduled to cover a unit on a particular day and the float books reveal the number of nurses "floated" into a unit in order to comply with the staffing guidelines. The daily time graphs, which are kept in the office of the Director of Nursing, show how many nurses actually worked and also show the number of per diem nurses who worked in a unit on a particular day.

B. Discussion and Conclusions

1. Deferral to arbitration

The grievances were filed on January 2, 2003 and on September 9, 2003 the Union filed a demand for arbitration. The arbitration hearing was scheduled to commence on March 9, 2004. On February 6 the Union submitted a Request for Information and on March 11 it filed the charge in this proceeding. Respondent contends that this matter should be deferred to arbitration pursuant to *Dubo Mfg.Corp.*, 142 NLRB 431 (1963). Respondent also cites General Counsel's Advice Memorandum, 14–CA–25299, 1984 NLRB Lexis 118 (June 13, 1984).

The grievances concern the staffing guidelines, which are specifically provided for in the collective-bargaining agreement and covered the time period from December 14, 2002 through January 2, 2003. While General Counsel and the Union take the position that the grievances were intended to be "continuing," it is Respondent's contention that the duration of the grievances was only until January 2, 2003. The complaint, on the other hand, alleges that Respondent committed an unfair labor practice by failing to comply with a request for information. The information requested covers the period of December 14, 2002 through January 15, 2004 and relates to the surgery unit in addition to the four units specified in the grievances.

The Board has consistently held that refusals to furnish information will not be deferred to arbitration. This policy is justified in part because the obligation to provide such information is derived from statutory duties independent of the labor contract. *NLRB v. Acme Industrial, Co.*, 385 U.S. 432, 437 (1967); *Daimler Chrysler Corp. v. NLRB*, 288 F.3d 434 (D.C. Cir. 2002). Respondent contends, however, that since the demand for arbitration was filed prior to the filing of the charge and the issuance of the complaint in the instant proceeding, the matter should be deferred to arbitration pursuant to *Dubo Mfg. Corp.*, supra. For the following reasons I believe that this case should not be deferred.

Counsel has not pointed to, nor do I find any provision in the collective-bargaining agreement, which deals with requests for information. In *American Standard*, 203 NLRB 1132 (1973), the Board held that it would not defer where "there is no contract clause dealing specifically with the furnishing of information". While in *United Aircraft Corp.*, 204 NLRB 879, 880 (1972), affd. sub nom. *Machinists Lodge 700*, 525 F.2d 237 (2d. Cir. 1975), the Board did defer to arbitration, the collective-bargaining agreement specifically provided that Respondent furnish the Union with certain information. In addition, were the instant proceeding to be deferred, the entire matter would not necessarily be resolved. The Request for Information covers five units, whereas the grievances cover only four units. Furthermore, the information request covers the period from December 14, 2002 through January 15, 2004. It is Respondent's contention, however, that the grievances cover the period only through January 2, 2003.

Finally, Respondent has cited *Dubo* and the June 1984 Advice Memorandum. In *Dubo*, the grievances requested a determination that certain employees had been wrongfully discharged and were entitled to reinstatement. The charges filed with the Board alleged the very same matters as the grievances, namely, unlawful discharges and the refusal to reinstate. Similarly, in the 1984 Advice Memorandum, the collective-bargaining agreement contained a "broad information clause and a grievance procedure." The Union filed a grievance over the employer's refusal to provide information which had been requested by the Union. The charge filed with the Board al-

leged that the employer unlawfully "refused to provide relevant and necessary collective bargaining information upon the request of the union." Thus, in both *Dubo* and in the 1984 Advice Memorandum, upon which Respondent relies, the grievance was the same as the alleged unfair labor practice. Such is not the case in the instant proceeding. Here, the grievances relate to the alleged failure to adhere to staffing guidelines. The alleged unfair labor practice charge, however, deals with Respondent's failure to comply with a Request for Information.

For the above reasons, pursuant to *Collyer Industrial Wire*, 192 NLRB 837 (1971) and *Dubo Mfg. Corp.*, supra, I conclude that this matter should not be deferred to arbitration.

2. Request for information

In *Conrock Co.*, 263 NLRB 1293, 1294 (1982), enfd. 118 LRRM 2955 (9th Cir. 1984), the Board stated:

> It is well settled that an employer has an obligation, as part of its duty to bargain in good faith, to provide information needed by a union to enforce and administer a collective-bargaining agreement. An employer must furnish information that is of even probable or potential relevance to the union's duties.

See also *Leland Stanford Junior University*, 262 NLRB 136, 139 (1982), enfd. 715 F. 2d 473 (9th Cir. 1983).

As detailed above, I have found Ms. Dedowitz to be a credible witness and have credited her testimony. As stated above, the reasons she gave for requiring the information requested in the Union's Request for Information dated February 6 all seem of "probable or potential relevance" to the Union's duties. See *Conrock*, supra, 263 NLRB at 1294. Accordingly, I find that Respondent's refusal to comply with the information request dated February 6 constitutes a violation of Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2 (2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The employees listed in Section 1 of the collective-bargaining agreement dated April 1, 2002 constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.
4. At all material times the Union has been the exclusive collective-bargaining representative of the employees in the appropriate unit.
5. By refusing to furnish the information requested in the February 6, 2004 letter, Respondent has violated Section 8(a)(1) and (5) of the Act.
6. The aforesaid unfair labor practice constitutes an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.
7. This matter shall not be deferred to arbitration.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

Respondent, WSNCHS North, Inc., d/b/a New Island Hospital, Hempstead, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with New York State Nurses Association by refusing to furnish the information requested in the Union's request for information dated February 6, 2004.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Upon request, furnish to the Union the information it requested in the letter dated February 6, 2004.

(b) Within 14 days after service by the Region, post at its facility copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 6, 2004.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 20, 2004

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

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[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT refuse to bargain collectively with New York State Nurses Association by refusing to furnish the information requested in the Union's letter dated February 6, 2004.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, upon request, furnish to the Union the information it requested in its letter dated February 6, 2004.

WSNCHS NORTH, INC., D/B/A NEW ISLAND HOSPITAL